Supreme Court, U.S.
FILED
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No.

In The
SUPREME COURT OF THE UNITED STATES

GARY LITTLEJOHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

38 U.S.C. 1151 was amended by Congress in October 1997 to require a veteran to prove the proximate cause of a disability he suffered as the result of care and treatment at a VA Medical Center was negligence on the part of the VA in furnishing the care and treatment.

The question presented by this petition is whether an award of compensation to a veteran under 38 U.S.C. 1151 is entitled to claim preclusion in a subsequent Federal Tort Claims Act action.

PARTIES TO THE PROCEEDINGS

Including the parties named in the caption of this Petition, the parties are:

Petitioner: [redacted] Littlejohn (Mr. Littlejohn), an individual.

Respondent: The United States of America

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The district court's opinion (per Hagen, D.J.) granting judgment in favor of the government was not published. The court of appeals opinion (per Beezer, C.J.) affirming the judgment is published at 321 F.3d 915.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on March 5, 2003. Justice O'Connor subsequently extended the time to file this petition for a writ of certiorari to and including July 3, 2003. Petitioner invokes this Court's jurisdiction under 28 USC 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of 38 U.S.C. 501 (a), 38 U.S.C. 511 (a), 38 U.S.C. 1151 (a) and 38 C.F.R. 3.328 (a), relevant to this petition, are set forth herein.

38 U.S.C. 501 (a):
The Secretary has authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws, including – (1) regulations with respect to the nature and extent of proof and evidence and the method of taking and furnishing them in order to establish the right to benefits under such laws; (2) the forms of application by claimants under such laws; (3) the methods of making investigations and medical examinations; and (4) the manner and form of adjudications and awards.

38 U.S.C. 511 (a):
The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secreatary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

38 U.S.C. 1151 (a):
Compensation under this chapter and dependency and indemnity compensation under chapter 13 of this title shall be awarded for a qualifying additional disability or a qualifying death of a veteran in the same manner as if such additional disability or death was service-connected. For purposes of this section, a disability or death is a qualifying additional disability or qualifying death if the disability or death was not the result of the veteran's willful misconduct and – (1) the disability or death was caused by hospital care, medical or surgical treatment, or examination furnished the veteran under any law administered by the Secretary, either by a Department employee or in a Department facility as defined in section 1701(3)(A) of this title, and the proximate cause of the disability or death was – (A) carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on the part of the Department in furnishing the hospital care, medical or surgical treatment, or examination; or (B) an event not reasonably foreseeable; or (2) the disability or death was proximately caused by the provision of training and rehabilitation services by the Secretary (including by a service-provider used by the Secretary for such purpose under section 3115 of this title) as part of an approved rehabilitation program under chapter 31 of this title;

38 C.F.R. 3.328 (a):

General. When warranted by the medical complexity or controversy involved in a pending claim, an advisory medical opinion may be obtained from one or more medical experts who are not employees of VA. Opinions shall be obtained from recognized medical schools, universities, clinics or medical institutions with which arrangements for such opinions have been made, and an appropriate official of the institution shall select the individual expert(s) to render an opinion.

STATEMENT OF THE CASE

Petitioner Gary Littlejohn is a veteran. In September 1996, he was examined at the Veteran's Administration (VA) Medical Center in Reno, Nevada, complaining of, among other things, intermittent tingling and numbness in his hands and arms, as well as dizziness and double vision. Littlejohn was then examined by Dr. John Eaton, a neurologist, who concluded that Littlejohn did not suffer from any neurological diseases. Eighteen days later, Littlejohn was hospitalized after suffering grand mal seizures. An MRI revealed that Littlejohn had suffered a series of strokes.

In October 1997, Congress amended 38 USC 1151 to require that a veteran prove that his disability was caused by the negligent act or omission of VA medical personnel prior to an award of benefits. This amendment was in response to the Supreme Court's decision in *Brown v. Gardner, 513 U.S. 115 (1994)* where the court determined that a VA regulation requiring proof of negligence for an award of benefits exceeded the scope of authority granted to the VA. Former 1151 did not require that a veteran prove negligence to be awarded benefits. This case and the lower court case of *Gardner v. Brown 5 F.3d 1456 (Fed. Cir. 1993)* reveal that the VA had been requiring veterans

to prove negligence prior to obtaining disability benefits without statutory authority for over 60 years and therefore had denied benefits to many veterans who were so entitled.

In December 1997, Littlejohn filed a disability claim with the VA, requesting benefits based upon disabilities traceable to the stroke incident. He claimed entitlement to benefits under 38 USC 1151, which provided, in part, for VA disability payments if the veteran could show that the proximate cause of the disability was carelessness, negligence, lack of proper skill, or error in judgment, on the part of the VA in furnishing hospital care, medical or surgical treatment, or examination.

The VA issued a Rating Decision in 1998 in which the examiner resolved all reasonable doubts in Littlejohn's favor and concluded that he was entitled to benefits under 1151. The examiner explicitly found that Dr. Eaton was negligent and the proximate cause of Littlejohn's strokes, based upon the opinion of the VA medical examiner, Dr. Richard Riordan. Subsequently, the VA issued a second Rating Decision in 1999, specifically recognizing that Littlejohn's earlier claim was granted because VA medical staff should have done testing to determine the extent of Littlejohn's neurological condition and such testing might have prevented Littlejohn's strokes or allowed for earlier treatment. The 1999 Rating Decision also determined that Littlejohn had suffered permanent injuries as a result of the strokes and the injuries would prevent Littlejohn from ever working again.

In September 1998, Littlejohn filed a tort claim with the VA that was denied by operation of law. Littlejohn then filed an action in federal district court under the FTCA, alleging negligence on the part of the VA physicians and requesting damages in excess of $2 million. Littlejohn argued that the two Rating Decisions relating to

his disability claims were entitled to claim and issue preclusive effect in his FTCA action. The district court had jurisdiction of the action under 28 U.S.C. 1346, 2671-2680.

The issue of claim preclusion was raised by Littlejohn in a motion for directed verdict in the trial of the FTCA action. The district court took the motion under submission and allowed the FTCA action to proceed to trial on the issues of negligence, causation and the nature and extent of Littlejohn's injuries. After a bench trial, the district court entered judgment for the government. The district court found that Dr. Eaton was not negligent in the care he gave to Littlejohn and the stroke he suffered, and its consequences, were not the direct and proximate result of any negligence by Dr. Eaton.

The Ninth Circuit affirmed the judgment of the district court holding that the Rating Decisions were afforded no claim preclusive effect. The Ninth Circuit had jurisidiction under 28 U.S.C. 1291.

REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit court of appeals has decided an important question of federal law, that claim preclusion should not apply to a FTCA action after an award to a veteran in a 38 U.S.C. 1151 claim, a question that has not been, but should be, settled by this Court. The Ninth Circuit has decided this important federal question in a way that conflicts with the decision in *Astoria F.S.& L. Assn. V. Solimino, 501 US 104 (1991)* by finding the structure of the disability benefit process prevented the VA from raising a causation defense during Littlejohn's disability benefit proceedings because such hearings were ex-parte and non-adversarial and therefore the VA had no adequate opportunity to present its causation defense in the 1151 claim. 38 U.S.C. 501 provides the VA with the authority to prescribe all rules and

regulations that are necessary or appropriate to carry out the laws administered by the VA. The VA had enacted regulations allowing it to present a causation defense.

2. The intent of Congress was to have claim preclusion apply to FTCA actions after the conclusion of a 38 U.S.C. 1151 claim. Claim preclusion applies due to 38 U.S.C. 511 that provides that all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court. This is a clear statement by Congress of its intent that claim preclusion must apply to a FTCA action following an 1151 claim. The Ninth Circuit failed to find any intent on the part of Congress that claim preclusion should not apply.

3. This case involves the amendment of 38 U.S.C. 1151 in 1997 that was prompted by the decision in *Brown v. Gardner, 513 US 115 (1994)* and is a case of first impression on the issue of whether claim preclusion applies to a FTCA action following a 38 U.S.C. 1151 claim.

4. This case involves the application of the fundamental common law principle of res judicata, or claim preclusion and the basic common law principle that a person has one cause of action arising from one transactional nucleus of facts involving the infringement of the same right. The VA lost on the issues of negligence, causation and the nature and extent of petitioner's injuries in the 1151 claim and deserves no rematch in the FTCA action.

5. The VA has a 60-year history of denying veterans benefits by enacting a regulation to require the veteran to prove negligence to obtain benefits under 1151 when Congress never gave the VA such authority. Once

Congress amended 1151 requiring a veteran to prove negligence to obtain benefits, the VA now claims that it had no authority to present a causation defense, even though the VA presented a defense on the issue of negligence and lost on that issue.

6. The Ninth Circuit states an underlying purpose of 1151 and the entire veterans' benefit program is to ensure that veterans, who have put their lives at risk in defending our nation and its liberties, are treated fairly by the same government that has asked so much from them. Mr. Littlejohn contends he has not been treated fairly by the government since he prevailed on the issues of negligence and causation in his 1151 claim and should not have to re-litigate these issues in his FTCA action. Mr. Littlejohn represents all veterans who have been injured by medical negligence at VA medical centers. This is a case of extreme public importance to millions of veterans and their families.

HISTORY OF 38 USC 1151

38 U.S.C. 1151 was first enacted as Section 213 of the World War Veteran Act in the 1920s. 1151 allowed veterans to seek benefits for injuries sustained due to the medical treatment rendered by VA medical personnel. The statute had no requirement of a finding of negligence and causation prior to granting compensation. The Federal Tort Claims Act (FTCA) allows veterans to bring a claim against the United States for damages for injuries sustained due to the medical treatment rendered by VA medical personnel. The FTCA claims have always required a finding of negligence and causation prior to an award of damages. Veterans could therefore seek benefits for injuries sustained as the result of medical treatment through an 1151 claim and veterans could seek damages through a FTCA claim. Since there was no requirement of proving

negligence and causation in an 1151 claim, a veteran's claim under 1151 was not the same cause of action as his FTCA claim that required a finding of negligence and causation. A veteran could pursue both the 1151 claim and the FTCA claim and a resolution of one of the claims would have no impact on the other. Therefore, under 1151 prior to the 1997 amendment, there was no issue of whether claim preclusion would apply since the 1151 claim was not the same cause of action as the FTCA claim.

The VA interpreted the former 1151 to require a finding of negligence and enacted a regulation (former 38 C.F.R. 3.358) mandating compensation benefits be granted only after the VA made a determination the disability was caused by negligence. From 1934 through 1994, the VA only granted benefits upon a finding of negligence even though the statute did not provide such authority. Thousands of veterans were denied benefits because the VA imposed a requirement of negligence without statutory authority. The reason why the VA required a finding of negligence was that it was less expensive. The VA paid out less benefits by imposing on the veteran "the complex and difficult burden of proving that negligence or an accident actually occurred during treatment as a condition of compensation". *Gardner v. Brown, 5 F.3d 1456 (Fed. Cir. 1993).*

In *Brown v. Gardner, 513 US 115 (1994)*, the court held the regulation, 38 C.F.R. 3.358c(3), invalid since the VA had no statutory authority to require a finding of negligence as a condition of compensation. In response to the *Brown* decision, in September 1997, Congress amended 38 U.S.C. 1151 to require a finding of negligence and causation prior to the granting of benefits. Since the amendment of 1151, a veteran's claim for benefits under 1151 is the same cause of action as his claim under the FTCA and the issues in the two claims are identical.

Therefore, a resolution of one of the claims will have an effect on the other claim under the common law principle of res judicata or claim preclusion.

The question presented by this case is whether the 1997 amendment of 38 U.S.C. 1151 requiring a factual finding of negligence and causation now requires the favored common law presumption of claim preclusion to apply. Petitioner contends that claim preclusion does apply to the findings made by the VA in an 1151 claim for the following reasons.

1. The Ninth Circuit opinion found that, (1) Claim preclusion prevents the re-litigation of claims previously tried and decided, and bars the subsequent application of all defenses that could have been asserted in a previous action between the same parties on the same cause of action, even if such contentions were not raised. When a ground of recovery or defense could not have been asserted in the prior action, however, the defense or ground of recovery falls outside the scope of claim preclusion. (2) The structure of the disability benefit process prevented the VA from raising a causation defense during Littlejohn's disability benefit proceedings because such hearings were ex-parte and non-adversarial. The VA is not authorized to develop evidence for the purpose of challenging the claimant, but rather is required to assist the claimant in developing the facts pertinent to his claim or her claim. (3) This claimant-friendly system provided no opportunity for the VA to develop and offer evidence of the kind that eventually proved the undoing of Littlejohn's FTCA claim, thus claim preclusion was inappropriate. (4) The district court was correct in refusing to give claim preclusive effect to the VA's Rating Decisions.

This portion of the Ninth Circuit's opinion is in direct and apparent conflict with *Astoria,* that holds that claim preclusion applies when an administrative agency is acting in a judicial capacity and resolves disputed issues of fact that the parties have had an adequate opportunity to litigate, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise. The Ninth Circuit opinion states that the VA had no adequate opportunity to litigate the issue of causation in the 1151 claim, but states nothing about the opportunity of the VA to litigate the issue of negligence. If the VA had an adequate opportunity to litigate the issue of negligence, it had an adequate opportunity to litigate the issue of causation. There is nothing in the district court's opinion that supports the statement of the Ninth Circuit that the lack of causation was the undoing of petitioner's FTCA action. The district court's opinion was that the VA medical personnel were not negligent and therefore, not the legal cause of petitioner's strokes.

The VA had an adequate opportunity to litigate the issues of negligence and causation. There is nothing in the VA statutes that limits the VA from asserting a defense of causation in an 1151 claim. Prior to the amendment of 1151, Congress had already given the VA the authority to enact regulations as to the nature and extent of proof and evidence as set forth in 38 U.S.C. 501. 38 U.S.C. 501 provides the VA with the authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department, including regulations with respect to the nature and extent of proof and evidence; the methods of making investigations and medical examinations; and the manner and form of adjudications and awards. The VA therefore had the authority to prescribe rules and regulations concerning how 1151 claims were to be litigated following the amendment of 1151 requiring the veteran to prove negligence and causation to obtain an award of benefits.

Prior to the amendment of 1151, the VA had enacted a regulation to deal with complex medical issues, 38 CFR 3.328, that allowed VA benefits personnel to consult with an independent medical examiner when a medical issue is obscure, complex or sufficiently controversial. The VA therefore had its own procedure to deal with complicated medical issues. The VA's own medical examiner, however, found this case to be a very simple case of medical malpractice.

Mr. Littlejohn told Dr. Eaton of his complaints; he had high blood pressure for many years and was on high blood pressure medication; he smoked; his mother died of a stroke in her early 50s; and he was afraid that he was having a stroke or would have a stroke in the near future. Mr. Littlejohn was 51 at the time. Dr. Eaton reassured Mr. Littlejohn he was not having a stroke; he had no neurological disease; and there was no reason to perform any further tests to diagnose his complaints. Eighteen days later, Mr. Littlejohn suffered a series of strokes that has required him to be on coumadin (rat poison) and has left him unemployable for the rest of his life.

The VA had its medical examiner, Dr. Richard Riordan, review the case and he determined Dr. Eaton was negligent in failing to order tests to diagnose petitioner's neurological condition and that the failure to do so had a considerable effect on petitioner having the strokes. Based upon Dr. Riordan's opinion, the VA examiner awarded Mr. Littlejohn benefits, specifically finding that Dr. Eaton was the negligent cause of the strokes suffered by Mr. Littlejohn.

In the FTCA action in district court, the VA had Dr. Eaton testify along with a colleague of Dr. Eaton and submitted the deposition testimony of the director of the Stanford Stroke Clinic. The VA could have developed its

defense to the claims of negligence and causation in the 1151 claim by simply calling Dr. Eaton and asking him for his opinion on whether he was negligent and the cause of Mr. Littlejohn's strokes. The VA had the opportunity to present defenses to the claims of negligence and causation in the 1151 claim but elected not to because the facts were a simple and clear case of medical malpractice as set forth by Dr. Riordan.

The amendment of 1151 to require the veteran to prove negligence and causation made the 1151 hearing necessarily an adversarial hearing. The issues of negligence and causation are issues that are always adversarial in nature. The burden on the veteran to prove negligence and causation created the burden on the VA to defend against the veterans' proof of these issues. Why should the veteran be required to prove negligence and causation and the VA not required to defend against negligence and causation in the 1151 claim? There is no statute that compels the VA to conduct 1151 claims in a non-adversarial manner. The VA has not enacted any regulation that states that 1151 are to be conducted in a non-adversarial manner.

The Ninth Circuit opinion states: (5) The statutory purposes embodied in 38 U.S.C. 1151 and the FTCA were incompatible with giving claim preclusive effect for the FTCA purposes to decisions granting benefits under 1151. The system established by Congress allowed benefit determinations and tort claims to take place in separate judicial forums. (6) The underlying purpose of 1151, to ensure that veterans were treated fairly by the government, explained the informal nature of 1151 proceedings, along with the proceedings' low standard of proof and other claimant-friendly procedures. These purposes were also reflected in the limited benefits available to beneficiaries. (7) In contrast, the FTCA allowed veterans to be made

whole, under certain circumstances, and could involve monetary claims that dwarfed the benefits available under 1151. The monetary gap between his disability award and the $2 million Littlejohn demanded in his FTCA complaint explained the need for higher standards of proof, the enhanced ability of the government to offer evidence, and the greater number of defenses available to the government that were generally associated with FTCA actions. (8) Thus, Littlejohn was not entitled to claim preclusive effect for the VA Rating Decisions.

As set forth in *Astoria:*

> "Courts do not, of course, have free rein to impose rules of preclusion, as a matter of policy, when the interpretation of a statute is at hand. In this context, the question is not whether administrative estoppel is wise but whether it is intended by the legislature. Thus, where a common-law principle is well established, as are the rules of preclusion, the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose is evident'."

Congress amended 1151 against the background of 38 U.S.C. 511, which provides that "all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court. This is a clear statement by Congress of its intent that claim preclusion must apply to a FTCA action following an 1151 claim. The Ninth Circuit opinion simply ignores this statute and is therefore in direct conflict with *Astoria.*

The benefits awarded to a veteran in an 1151 claim and the tort damages awarded to a veteran in a FTCA action are cumulative remedies and are determined in separate judicial forums. Once 1151 was amended, the veteran had his choice of judicial forums in which to pursue his one cause of action and where the issues of negligence and causation are judicially determined. He can choose to litigate these issues in the 1151 claim process, where he cannot be represented by counsel but where the claim is adjudicated swiftly and inexpensively or he can choose to litigate the issues in a FTCA action, where he can be represented by counsel and have his day in court. There is no statutory requirement that the 1151 claim be brought before the FTCA action. The FTCA has a two-year statute of limitations while an 1151 has no statute of limitations. There is no statutory requirement that an 1151 claim be resolved before the filing of a FTCA action. The Ninth Circuit fails to support its decision with any evidence of the intent of Congress that claim preclusion should not apply.

The Ninth Circuit found that the statutory purposes embodied in 1151 and the FTCA were incompatible with giving claim preclusive effect to FTCA claims after decisions granting benefits under 1151. These statutory purposes include the fair treatment of veterans by the government, the informal nature of the 1151 proceedings, the low standard of proof and other claimant-friendly procedures. These purposes and procedures may have been evident prior to the amendment of 1151 when the veteran did not have to prove negligence and causation to obtain benefits, but they are not evident now since the amendment of 1151. Further, these purposes and procedures were not established by Congress, but by the VA in administering 1151 claims prior to the amendment of 1151. The Ninth Circuit opinion fails to set forth any intent of Congress to not have claim preclusion apply to FTCA actions after the amendment of 1151.

The Ninth Circuit opinion points out that 1151 benefits are limited in relation to the damages a veteran can receive in a FTCA action that would make him whole. This monetary gap explains the need for higher standards of proof, the enhanced ability of the government to offer evidence and the greater number of defenses available to the government that were generally associated with FTCA actions. As set forth above, the VA had the authority from Congress to present the same defenses in the 1151 claim as it had in the FTCA action. The VA simply failed to take advantage of those defenses in the 1151 claim.

The holding of the Ninth Circuit is that while the veteran has the onerous burden of proving negligence and causation in his 1151 claim to obtain small monthly benefits, the VA has no obligation to develop evidence to defend against the veteran's claim. The Ninth Circuit reasons that since the monthly benefits will not cost the VA much money, there is no reason to spend time and resources to defend against the 1151 claim. The purpose of amending 1151 was to make it harder for the veteran to obtain benefits and therefore reduce the amount of money the VA had to pay out in benefits. To comply with this purpose, the VA should have presented a defense to the 1151 claim. The cost to the VA in not defending an 1151 claim may be minor for one claim but are considerable for many 1151 claims. The cost of granting too many 1151 claims under the prior 1151 were the very reasons why 1151 was amended.

Since the veteran has the burden of proving negligence and causation in his 1151 claim, the VA has the obligation to defend against those issues as a matter of fairness to the veteran, so the veteran only has to prove his claim once. Although the cost of granting benefits to a veteran under 1151 may be minimal to the VA, these benefits are not minimal nor trivial to the veteran, who has risked his life for the liberty of the country and who, because of injuries suffered in combat, may not be able to work and support himself and his family.

When Congress amended 1151, it did so knowing that the VA had been given the authority to prescribe rules and regulations that are necessary or appropriate to carry out the laws administered by the Department. The VA should have recognized that the amendment of 1151 requiring the veteran to prove negligence and causation may require a change in its procedures to make them more adversarial and to ensure that the VA would adequately defend against the new evidence and burden of proof required of the veteran. For the VA now to claim that it had no adequate opportunity to defend against Littlejohn's claim for benefits under 1151 and that claim preclusion should not apply because the VA did not assert a vigorous defense is the same arrogant attitude taken by the VA when it denied veterans benefits due to lack of negligence without statutory authority. This case presents the issue of whether the VA is administering veteran benefit claims under 1151 and claims for damages under the FTCA fairly to the veteran and within the authority provided the VA by Congress.

One of the primary purposes of the no judicial review policy set forth in 38 U.S.C. 511 was to ensure that VA employees would not be required to appear in federal court to explain how they arrived at their decisions and to avoid taking these employees away from their job duties. During the trial of the FTCA action in district court, the VA medical examiner, Dr. Richard Riordan, testified, "Mr. Littlejohn did not receive good medical care or correct, timely diagnosis by the Reno VAMC neurologist". The attorney representing the VA then spent several minutes discrediting this opinion so that Dr. Riordan finally recanted his opinion. Dr. Riordan then testified that "he won't give any 1151 opinions that are favorable to the veteran" and that he "would tell management, 'this is your problem'".

Any veteran who now seeks benefits in an 1151 claim out of the Oakland VA Claims Center can expect to lose his 1151 claim since the VA medical examiner will never again give a favorable opinion of negligence and causation to a veteran, even though the facts may warrant such an opinion. One of the reasons to apply claim preclusion is to prevent vexatious litigation. The application of claim preclusion in this context will prevent the re-litigation of claims that have been fairly tried, prevent inconsistent judgments and promote sound and fair judicial policy.

As set forth in *Astoria*, the principle of res judicata is applied to enforce repose. "Such repose is justified on the sound and obvious principle that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise. To hold otherwise would, as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution." Mr. Littlejohn has shouldered his burdens as a veteran and in proving his claim of negligence and causation through the 1151 claim process. The VA deserves no rematch.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GARY LITTLEJOHN,

Plaintiff,

No. 01-16265
D.C. No.
CV-99-00451-DWH

vs

OPINION

UNITED STATES OF AMERICA,

Defendant.
_____/

Appeal from the United States District Court
For the District of Nevada
David Warner Hagen, District Judge, Presiding

Argued and Submitted
October 9, 2002 – San Francisco, California

Filed March 5, 2003

Before: Dorothy W. Nelson, Robert R. Beezer and
Kim McLane Wardlaw, Circuit Judges

Opinion by Judge Beezer

SUMMARY

TORTS/LITIGATION and PROCEDURE (Civil)

The court of appeals affirmed a judgment of the district court. The court held that the statutory purposes embodied in the veterans' disability benefits statute, 38 U.S.C. 1151, and the Federal Torts Claims Act (FTCA), are incompatible with giving claim preclusive effect for FTCA purposes to decisions granting benefits under 1151.

Appellant Gary Littlejohn was a veteran. He was examined at the Veteran's Administration (VA) Medical Center in Reno, Nevada, complaining of, among other things, intermittent tingling and numbness in his hands and arms, as well as dizziness. Littlejohn was then examined by Dr. John Eaton, a neurologist, who concluded that Littlejohn did not suffer from any neurological diseases. Two weeks later, Littlejohn was hospitalized after suffering grand mal seizures. An MRI revealed that Littlejohn had suffered a series of strokes. Littlejohn filed a disability with the VA, requesting benefits based on disabilities traceable to the stroke incident. He claimed entitlement to benefits under 1151, which provided, in part, for disability payments if the veteran could show that the proximate cause of the disability was carelessness, negligence, lack of proper skill, or error in judgment, on the part of the VA in furnishing hospital care, medical or surgical treatment, or examination. The VA issued a Rating Decision in 1998 in which the examiner resolved all reasonable doubts in Littlejohn's favor and concluded that he was entitled to benefits under 1151. Subsequently, the VA issued a second Rating Decision in 1999, specifically recognizing that Littlejohn's earlier claim was granted because VA medical staff should have done more testing and such testing might have prevented Littlejohn's strokes or allowed for earlier treatment.

Littlejohn also filed a claim in federal district court under the FTCA, alleging negligence on the part of two VA physicians and requesting damages in excess of $2 million.

Littlejohn argued that the two Rating Decisions relating to his disability claims were entitled to claim and issue preclusive effect in his FTCA action. The district court disagreed, and after a bench trial, entered judgment for the government.

Littlejohn appealed, claiming that the district court must give claim or issue preclusive effect to the VA's Ratings Decision.

[1] Claim preclusion prevents the relitigation of claims previously tried and decided, and bars the subsequent application of all defenses that could have been asserted in a previous action between the same parties on the same cause of action, even if such contentions were not raised. When a ground of recovery or defense could not have been asserted in the prior action, however, the defense or ground of recovery falls outside the scope of claim preclusion. [2] The structure of the disability benefit process prevented the VA from raising a causation defense during Littlejohn's disability benefit proceedings because such hearings were ex parte and non-adversarial. The VA is not authorized to develop evidence for the purpose of challenging the claimant, but rather is required to assist the claimant, but rather is required to assist the claimant in developing the facts pertinent to his or her claim. [3] This claimant-friendly system provided no opportunity for the VA to develop and offer evidence of the kind that eventually proved the undoing of Littlejohn's FTCA claim, thus claim preclusion was inappropriate. [4] The district court was correct in refusing to give claim preclusive effect to the VA's Rating Decisions.

[5] The statutory purposes embodied in 1151 and the FTCA were incompatible with giving claim preclusive effect for FTCA purposes to decisions granting benefits under 1151. The system established by congress allowed benefit determinations and tort claims to take place in separate judicial forums.

[6] The underlying purpose of 1151, to ensure that veterans were treated fairly by the government, explained the informal nature of 1151 proceedings, along with the proceedings' low standard of proof and other claimant-friendly procedures. These purposes were also reflected in the limited benefits available to beneficiaries. [7] In contrast, the FTCA allowed veterans to be made whole, under certain circumstances, and could involve monetary claims that dwarfed the benefits available under 1151. The monetary gap between his disability award and the $2 million Littlejohn demanded in his FTCA complaint explained the need for the higher standards of proof, the enhanced ability of the government to offer evidence, and the greater number of defenses available to the government that were generally associated with FTCA actions. [8] Thus, Littlejohn was not entitled to claim preclusive effect for the VA Rating Decisions. [9] Further, issue preclusion was inappropriate as the procedures established for 1151 claims provided the government with neither the tools nor the opportunity to fully litigate the negligence and causation questions in Littlejohn's case. The judgment of the district court had to be affirmed.

COUNSEL

Thomas M. Witte, Fair Oaks, California, for the plaintiff-appellant.

Greg Addington, Assistant United States Attorney, Reno, Nevada, for the defendant-appellee.

OPINION

BEEZER, Circuit Judge:

In August 1998, the Department of Veterans Affairs ("VA") awarded Gary Littlejohn disability benefits for disabilities stemming from a series of strokes. In a subsequent action under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. 1346, 2671-2680, Littlejohn alleged negligence on the part of two VA physicians who treated him before he began suffering grand mal seizures in connection with the strokes.

Before the district court, Littlejohn argued that the two administrative decisions of the VA relating to his disability claims (the "Rating Decisions") were entitled to claim and issue preclusive effect in his FTCA action. The district court disagreed. After a bench trial, the district court entered judgment for the government. Littlejohn timely appeals. We have jurisdiction under 28 U.S.C. 1291, and we affirm.

I

In September 1996, Littlejohn, a veteran, was examined at the VA Medical Center in Reno, Nevada ("VA Reno"). He complained of intermittent tingling and numbness in his hands and arms, as well as dizziness. Littlejohn also complained of memory loss and intermittent diplopia (double vision). Littlejohn was scheduled for a neurological consultation, which took place on September 27, 1996.

At that consultation, Littlejohn was examined by Dr. John Eaton, a neurologist. Dr. Eaton concluded that Littlejohn did not suffer from any neurological diseases. Two weeks later, Littlejohn was hospitalized after suffering grand mal seizures. An MRI revealed that Littlejohn had suffered a series of strokes.

In December 1996, Littlejohn filed a disability claim with the VA, requesting benefits based on disabilities traceable to the stroke incident. He claimed entitlement to benefits under 38 U.S.C. 1151 . This statute provides for VA disability payments if claimants can show their disabilities are:

The VA issued a Rating Decision in August 1998 ("The 1998 Rating Decision"). The 1998 Rating Decision reviewed the evidence submitted by Littlejohn and referred to an earlier review of the case conducted by Dr. R.F. Riordan, the Regional Office Medical Officer. Dr. Riordan expressed the opinion that Littlejohn did not receive quality medical care or a correct, timely diagnosis from VA Reno's doctors. Dr. Riordan concluded that the effect of this failure on Littlejohn's disability was indeterminable, but was probably considerable. Based on the record before her, the examiner resolved all reasonable doubts in Littlejohn's favor and concluded that he was entitled to benefits under 1151.

One month after the 1998 Rating Decision was issued, Littlejohn claimed entitlement to further disability payments, alleging his disability was now total. He also claimed entitlement to an earlier effective date for his award, going back to the time of his seizures.

The VA issued another Rating Decision in August 1999 (the "1999 Rating Decision"), which specifically recognized that Littlejohn's earlier claim was granted because VA medical staff should have done more testing and such testing might have prevented Littlejohn's strokes or allowed for earlier treatment. In this 1999 Rating Decision, the VA granted portions of Littlejohn's request for greater benefits, but denied his request related to the award's effective date. In making these determinations, the examiner again found that a number of Littlejohn's disabilities resulted from VA hospitalization or medical treatment.

In addition to his disability claims, Littlejohn filed a claim with the VA under the FTCA, alleging negligence on the part of two VA physicians and requesting damages of $5,000,000. the VA denied the claim through non-action. Littlejohn then filed an FTCA action in the district court, with his operative complaint requesting damages in excess of $2,000,000.

Littlejohn moved for summary judgment on the issue of liability under the FTCA, arguing that the VA's Rating Decision have preclusive effect, establishing liability for negligence under his FTCA claim. The district court denied the motion. A bench trial followed. During the trial, Littlejohn moved for a directed verdict on the issue of liability, again arguing the preclusive effect of the VA's Rating Decisions. This motion was taken under submission until the end of trial.

Following trial, the district court entered findings of fact, conclusions of law and judgment for the government. The court did not make an express ruling on the directed verdict motion. The district court ultimately concluded that Littlejohn's VA physicians were not negligent under the FTCA and their treatment of Littlejohn was not a proximate cause of his stroke-related disabilities. On appeal, Littlejohn claims that the district court must give claim or issue preclusive effect to the VA's Ratings Decisions.[1]

II

Claim preclusion and issue preclusion are related doctrines used to protect the finality of decisions and prevent the proliferation of litigation. *Amadeo v. Principal Mut. Life Ins. Co., 290 F.3d 1152, 1160 (9th Cir. 2002).* The two doctrines are based on the same general principle: After a claim or issue is properly litigated, that should be the end of the matter for the parties to the action. Although the two doctrines are related, they protect distinct values and may be used in different ways. *See, e.g., Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979).*

[1] Littlejohn does not contest the district's court's findings of fact, only the district court's ability to make these findings.

Littlejohn invokes both doctrines in this appeal. The district court's application of the two doctrines involves a mixed question of law and fact, which we review *de novo*. *A & A Concrete, Inc. v. White Mountain Apache Tribe, 781 F.2d 1411, 1414 (9th cir. 1986).*

A

Littlejohn contends that FTCA liability is established by the VA's Rating Decisions under traditional claim preclusion principles. We disagree. Littlejohn's claim preclusion argument fails because the VA could not assert its FTCA causation defense in the disability benefit proceedings. We further hold that claim preclusion is incompatible with the statutory purposes underlying the veterans' disability and FTCA statutory schemes.

1.

[1] Claim preclusion prevents the relitigation of claims previously tried and decided.[2] *Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1320 (9th Cir. 1992). It bars the subsequent application of all defenses that could have been asserted in a previous action between the same parties on the same cause of action, even if such contentions were not raised. *Id.* Traditionally four factors are considered when determining whether successive lawsuits involve the same "cause of action":

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by the prosecution of the second action;

[2] We use the term "claim preclusion" rather than "res judicata" for purposes of clarity. See 18 James Wm. Moore et al., *Moore's Federal Practice* 131.10 (3d ed. 2002) (discussing use of these terms).

> (2) whether substantially the same evidence is presented in the two actions;
>
> (3) whether the two actions involve infringement of the same right; and
>
> (4) whether the two actions arise out of the same transactional nucleus of facts.

Id. at 1320. This cause of action analysis is unnecessary, however, when a ground of recovery or defense could not have been asserted in the prior action. *See id.* at 1321. In such cases, the defense or ground of recovery falls outside the scope of claim preclusion. *Id.; see also Brown v. Felsen, 442 U.S. 127, 131 (1979).*

Littlejohn primarily contends that his disability claim and his FTCA claim involve the same cause of action. We find it unnecessary to reach this argument because Littlejohn's claim preclusion argument falters on a more fundamental level: The VA was unable to raise its causation defense in Littlejohn's disability benefit proceedings.[3]

[2] The structure of the disability benefit process prevented the VA from raising a causation defense at that time. Disability hearings are ex parte and non-adversarial. *See Maio v. Derwinski, 1 Vet app. 140, 144 (1991); see also Forshey v. Principi, 284. cert. denied,* 123 S. Ct. 110 (2002).

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[3] Because this case involves the claim preclusive effect of an administrative decision, the most appropriate analysis presumes claim preclusion applies unless "a statutory purpose to the contrary is evident." *Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 u.s. 104,108 (1991).* Although we follow the parties in using the traditional claim preclusion criteria, the result is the same under the *Astoria* analysis.

Evidence presented in an 1151 claim benefits hearing is limited to information presented by the claimant and certain types of information discovered by the VA. *See* 38 C.F.R. 3.103, 3.59, 3.328. The VA is not authorized to develop evidence for the purpose of challenging the claimant, but rather is required to "assist a claimant in developing the facts pertinent to [his or her] claim." 38 C.F.R. 3.103.[4] When a medical issue is obscure, complex or sufficiently controversial, however, an independent medical examiner may be consulted. 38 C.F.R. 3.328.

[3] This claimant friendly system provides no opportunity for the VA to develop and offer evidence of the kind that eventually proved the undoing of Littlejohn's FTCA claim.[5] Claim preclusion is inappropriate.

This conclusion is not altered by Littlejohn's argument that refusing to apply claim preclusion in this FTCA action results in impermissible judicial review of the VA's disability determinations, violating 38 U.S.C. 511.[6] We recognize that 38 U.S.C. 7292 (c) designates the Federal Circuit as the only Article III court with jurisdiction to hear challenges to VA determinations regarding disability benefits and this review is limited by 511.[7] *See Price v. United States*, 228 f.3d 420, 421 (D.C. Cir. (per curiam)

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[4] Although the scope of this duty recently has been in flux, these differences are immaterial for purposes of this appeal. *Compare Epps v. Gober, 126 F.3d 1464, 1468-69* (Fed.Cir. 1997) (holding that a claimant for veterans' disability benefits must submit and establish a "well grounded" claim before the VA is required to provide assistance), *with* Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 4, 114 Stat 2096 (2000) (amending 38 U.S.C. 5107(a) to remove "well grounded" language); *see also* Bernklau v. Prinicipi, 291 F.3d 795, 803 (Fed. Cir. 2002) (recognizing the overruling of Epps).

[5] This conclusion is reinforced by the separate administrative procedures set up by the VA to deal with FTCA claims. *Compare* 38 C.F.R. 14.600-.605 (FTCA procedures), *with* 38 C.F.R. 3.100-.115 (procedures for disability benefit claims).

[6] Section 511 provides, with certain exceptions, that decisions related to the provision of veterans' benefits "may not be reviewed by any other official or by any other court, whether by an action in the nature of mandamus or otherwise." 38 U.S.C. 511.

(summarizing review system), *cert. denied, 122 S. Ct. 234 (2001).* Littlejohn's judicial review argument fails, however, because he has not shown how the adverse decision in the present case could possibly have any effect on the benefits he has already been awarded. *Cf.* C.F.R. 3.105 (governing revision of decisions). Without any diminution of his entitlement to disability benefits, we see no way in which a decision on the merits of Littlejohn's FTCA claim amounts to judicial review of the 1151 proceedings.

[4] The district court was correct in refusing to give claim preclusive effect to the VA's Rating Decisions. Littlejohn's attempt to treat disability hearings as an adversarial process is foreclosed by Congress, the courts and the VA's regulations.[8]

2.

As part of his argument that the Rating Decisions are entitled to claim preclusive effect, Littlejohn argues that not only *could* the VA bring forward the evidence that eventually defeated his FTCA claim, but that the VA *should* have done so. We have already rejected the first argument, but we also address the second.

Littlejohn argues for giving claim preclusive effect to an adjudicatory decision by an administrative agency. Agency decisions usually are entitled to claim preclusive effect, but his does not hold universally. *See Astoria*, 501 U.S. at 107.

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[7] Section 7292 provides, in relevant part: The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under this section, and to interpret constitutional and statutory provisions, to the extent presented and necessary to the decision.

[8] *See, e.g.*, 38 U.S.C. 5107 (a) (1994) (requiring the VA to assist claimants); *Hodge v. West*, 155 F.3d 1356, 1362 (Fed.Cir. 1998) ("[The Federal Circuit] and the Supreme Court both have lng recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant"); 38 C.F.R. 3.102 ("it is the defined and consistently applied policy of the [VA] to administer the law under a broad interpretation . . . .").

The suitability of administrative claim preclusion "may vary according to the specific context of the rights at stake, the power of the agency, and the relative adequacy of agency procedures." *Id.* at 109-10. These concerns with administrative claim preclusion differ in some ways from the traditional claim preclusion test for judicial proceedings. *Id.* The Supreme Court teaches that we "may take it as given" that Congress has legislated with an expectation that administrative agency decisions decided in a judicial capacity are entitled to preclusive effect except when a statutory purpose to the contrary is evident. *Id.* at 108.

[5] We hold that the statutory purposes embodied in 1151 and the FTCA are incompatible with giving claim preclusive effect for FTCA purposes to decisions granting benefits under 1151. *See Astoria*, 501 U.S. at 108-110. The system established by Congress currently allows benefit determinations and tort claims to take place in separate judicial forums. *See* 28 U.S.C. 1346(b)(1) (providing for district court jurisdictions over FTCA claims); 38 U.S.C. 511, 7292 (providing for exclusive jurisdiction in the Federal Circuit for limited review of VA disability determinations). This separation reflects the underlying purpose of 1151 and the entire veterans benefit program, namely ensuring that veterans, who have put their lives at risk in defending our nation and its liberties, are treated fairly by the same government that has asked so much from them. *See* 38 U.S.C. 1110; *Hodge*, 155 F.3d at 1362-63. At the same time, 1151 does not purport to make veterans whole, representing a tension between equitable concerns and fiscal limitations.

[6] These underlying purposes explain the informal nature of 1151 proceedings, along with the proceedings' low standard of proof and other claimant-friendly procedures. These purposes are also reflected in the limited benefits available to beneficiaries. Section 1151 provides a baseline of support for veterans, in contrast to the FTCA, which potentially allows veterans to be made whole when the government is at fault for their disabilities stemming from VA medical treatment.

Congress expressly recognized these differing roles when it provided for the integrated handling of FTCA and 1151 awards to prevent double recoveries. 38 U.S.C. 1151(b); *see also United States v. Brown*, 348 U.S. 110, 113 (1954) (FTCA and disability benefits are both available for veterans injured by VA hospital treatment). Littlejohn's recommended modifications to the VA's disability benefit procedures, suggested to protect the government against any claim preclusive effect given to the VA Rating Decisions granting benefits, are incompatible with this system. They are foreclosed by law and would risk turning benefit determinations into FTCA battlegrounds. *Cf. Hodge*, 155 F.3d at 1360, 1362-63 (refusing to import definition of term from Social Security context because VA system is more claimant-friendly); *Gregory v. Bowen*, 844 F.2d 664, 666 (9th Cir. 1988) (refusing to give claim preclusive effect to Social Security determination because "res judicata should not be applied rigidly in administrative proceedings").

[7] Nor is giving claim preclusive effect to these determinations compatible with the FTCA. The FTCA allows veterans to be made whole, under certain circumstances, but this may involve monetary claims that dwarf the benefits available under 1151. Littlejohn's claims are precisely of this kind. The monetary gap between his disability and the $2 million he demands in his FTCA complaint explains the need for the higher standards of proof, the enhanced ability of the government to offer evidence and the greater number of defenses available to the government that are generally associated with FTCA actions.

Littlejohn contends that claim preclusion is consistent with these statutes because both the FTCA and 1151 focus on his right to be free from negligent medical treatment. This is not the case. Section 1151 is not directed at forbidding or punishing negligence. Instead, it provides an entitlement to benefits by defining when certain types of disabilities and injuries are to be treated as "service-connected." 38 U.S.C. 1151(a).

Although 1151 may track the requirements for FTCA liability in some ways and for some cases, it also reaches beyond negligence, and at times even beyond fault. *See* 38 U.S.C. 1151(a)(1)(B) (including "an event not reasonable foreseeable" as justification for a benefits award). This indicates that 1151 is more focused on the injury to the veteran than on the fault of the VA.

[8] The qualification requirements simply serve to ensure that claimants meet *some* standard of proof before becoming entitled to disability benefits.[9] The statute's standards reflect a dividing line meant to limit the government's financial exposure. *See* H.R. Conf. Rep. 104-350, at 1289 (1995) (noting savings of $89 million in the fiscal year 1996 growing to savings of $2.498 billion over the period from fiscal year 1996 to 2002 with the reinstatement of a "fault test"). The overlapping coverage of 1151 and the FTCA is compatible with the recognition that these two statutory schemes serve separate purposes. Littlejohn's argument to the contrary is unavailing. He is not entitled to claim preclusive effect for the VA Rating Decisions relied upon in this case.

B.

Littlejohn also invokes issue preclusion as an independent ground upon which the district court's judgment should be reversed.[10] This argument fails as well.

Issue preclusion bars the relitigation of issues actually adjudicated in previous litigation between the same parties. *Clark*, 966 F.2d at 1320. A party invoking issue preclusion must show:

> 1) the issue at stake is identical to an issue raised in the prior litigation;
>
> 2) the issue was actually litigated in the prior litigation; and
>
> 3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the earlier action.

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[9] This rationale was advanced by the government in *Brown v. Gardner*, 513 U.S. 115 (1994). Although the *Brown* court rejected that contention, *see* 513 U.S. at 119, Congress then amended 1151, explicitly adopting a "fault test" as a method of establishing when an injury is service-connected." *See Pub. L. No. 104-204, 422(a)(1), 110 Stat. 2874, 2926-27 (1996).*

[10] We use the term "issue preclusion" rather than "collateral estoppel."

Id.. The Supreme Court has elaborated on the "actually litigated" requirement, recognizing that issue preclusion is inappropriate where the parties have not had a full and fair opportunity to fully litigate the merits of an issue. *See Allen v. McCurry*, 449 U.S. 90, 94-95 (1980).

[9] The procedures established for 1151 claims provided the government with neither the tools nor the opportunity to fully litigate the negligence and causation questions in Littlejohn's case. *See supra,* Part II.A.1. In this context, issue preclusion is inappropriate.

The unavailability of issue preclusion is reinforced by the differences in the burdens of proof in the two proceedings. Under the FTCA, Littlejohn's negligence claim is evaluated using Nevada law. *See* 28 U.S.C. 1346(b)(1); *FDIC v. Meyer,* 510 U.S. 471, 478 (1994). Nevada law requires plaintiffs to establish negligence by a preponderance of the evidence. *Perez v. Las Vegas Med. Ctr.,* 805 P.2d 589, 591 (Nev. 1991) (stating the general Nevada rule). In contrast, the VA's disability system imposes a lower burden of proof on claimants, resolving reasonable doubts in the claimants' favor where "there is an approximate balance of positive and negative evidence." 38 U.S.C. 5107(b); 38 C.F.R. 3.102. Such differences in the burden of proof also prevent issue preclusion. *Clark, 966* F.2d at 1322.

We note that issue preclusion has been rejected consistently by those courts addressing the relation of prior VA disability determinations to FTCA claims. *See Sweet v. United States,* 687 F.2d 246, 248-49 (8th Cir. 1982); *Faughnan v. Big Apple Car Serv.,* 828 F. Supp. 155. 164-65 (E.D.N.Y. 1993). Although the rationales in these cases may differ, their uniform result is consistent with our analysis.[11] The district court's decision refusing to apply issue preclusion was correct.

III

Littlejohn's arguments for claim and issue preclusion attempt to turn the non-adversarial procedures available under 1151 into a sword for purposes of tort liability. This attempt fails. The liberal procedures controlling an evaluation of 1151 claims were not established to give claimants an advantage in pursuit of FTCA liability through either claim or issue preclusion. The district court's judgment is AFFIRMED.

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[11] These cases were decided under an earlier version of 1151, but they also were decided during a period in which the VA evaluated 1151 benefit claims under a regulation paralleling the current version of the statute. *Compare* 38 C.F.R. 3.358©(3) (1993), *with* 38 U.S.C. 1151(a) (2000).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GARY LITTLEJOHN NO. 01-16265
Plaintiff/Appellant

v. CT/AG# CV-99-00451-DWH

UNITED STATES OF AMERICA
Defendant/Appellee

APPEAL FROM the United States District Court for the District of Nevada (Reno0.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada (Reno) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered March 5, 2003

Judgment entered on April 29, 2003

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

GARY LITTLEJOHN,

Plaintiff, **JUDGMENT IN A CIVIL CASE**

vs

CASE NUMBER: CV-N-99-451-DH-RM

UNITED STATES OF AMERICA

Defendant.

DECISION BY COURT. This action came to be considered before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the defendant and against the plaintiff.

May 1, 2001
Date

LANCE S. WILSON
Clerk

MARCIA K. COOPER
(By) Deputy Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

GARY LITTLEJOHN,

FINDINGS OF FACT and CONCLUSIONS OF LAW

Plaintiff,

vs

CASE NUMBER: CV-N-99-451-DH-RM

UNITED STATES OF AMERICA

Defendant

_____/

This action for damages, based upon the alleged negligent failure of defendant's agents to diagnose and prescribe prophylactic treatment for plaintiff's impending stroke, came to trial on March 22, 2001, before the court sitting without a jury. Thomas Witte and Russell Porter represented plaintiff, and Greg Addington represented defendant. Having heard the testimony and examined the proofs offered by the parties, and the cause having been submitted for decision, the court is fully advised in the premises and makes its findings of facts as follows:

FINDINGS OF FACT

It is true that:

1. Plaintiff is a veteran of the Armed Forces of the United States.

2. On September 27, 1996, John M. Eaton, M.D., a Neurology Diplomate of the American Board of Neurology and Psychiatry, was employed as Professor of Clinical Medicine at the University of Nevada Medical School.

3. In the course and scope of his duties he conducted neurological clinics at defendant's Veterans Administration Hospital, Reno, Nevada, on Monday, Wednesday and Friday of each week. In this he was defendant's agent.

4. On Wednesday, September 25, 1996, plaintiff presented himself to the emergency room of the Veterans Administrative Hospital, complaining of a variety of recently experienced transient symptoms.

5. He was examined by Brian Chitwood, M.D., a family practice resident who at that moment was on duty doing extra work as a Veteran Administration Hospital emergency room physician. In this he was defendant's agent.

6. Before Dr. Chitwood's examination, Plaintiff gave the triage nurse a history of having experienced tingling in both hands for three days, a numb left forearm the day earlier for three or four minutes, and dizziness for two weeks.

7. Plaintiff then gave to Dr. Chitwood the following history: a 51 year-old male presenting with intermittent numbness, tingling in the hands and arms for two to three weeks, not worsening over this time. Plaintiff is mostly concerned with memory loss over the same duration; patient has been in two motor vehicle accidents over the last three months without loss of consciousness; patient had a history of hypertension, anxiety and post traumatic stress disorder, but patient has had no recent anxiety or panic attacks; patient stated that he had experienced intermittent diplopia. Patient stated that he was taking benzepril for high blood pressure and Buspar for anxiety; that he had no allergies but was a smoker.

8. Dr. Chitwood then did a brief physical examination, followed by a neurological examination. The head, eyes, ears, nose and throat examination showed pupils equal and reactive to light with extraocular movements intact, the neck supple with full range of motion and no tenderness, and the lings clear. The neurological examination showed plaintiff to be alert and oriented, with cranial nerves two through twelve intact. A motor and sensory examination of plaintiff's arms and legs showed them to be normal, deep tendon reflexes to be normal and gait normal.

9. Dr. Chitwood could not diagnose the cause of plaintiff's intermittent numbness, but found nothing that he considered abnormal. For this reason, he decided not to proceed with admission or imaging or additional evaluation, but because plaintiff gave a history of intermittent diplopia, Dr. Chitwood referred him for an evaluation follow-up at the next neurological clinic, scheduled in two days.

10. On Friday, September 27, 1996, plaintiff presented himself to the Veterans Administration neurological clinic where he was seen by Dr. Eaton.

11. Dr. Eaton received from plaintiff and recorded the following history: "Two weeks hands and fingertips have been going numb; two days left arm below elbow numb, more during day, not when he moves, lightheaded, no vertigo. Yesterday left eyelid was swollen, vision blurred; no diplopia, no focal loss, no weakness, no loss of consciousness; three to four weeks frequent headache – preceded by lightheadedness. [auto accident] June 96 and three weeks ago, not [knocked out] with either one; has had back and leg pain since; concern because mother died of stroke at age 52; service connected [post traumatic stress disorder], smokes one pack per day."

12. Dr. Eaton then conducted a physical examination. He found: "Cranial nerves normal, motor normal, deep tendon reflexes equal, plantar responses and flexor sensation intact."

13. From this Dr. Eaton concluded: "Impression, no neurologic disease." He then discussed this diagnosis with plaintiff, urged him to stop smoking, and discharged him.

14. There was no medically justifiable reason to conclude either on September 25 or 27, 1996, that plaintiff had recently experienced an ischemic event. Moreover, plaintiff was not experiencing a stroke on either September 25 or 27, 1996, because he had no neurologic findings on either occasion.

15. During the next couple of weeks, plaintiff attended to his normal activity. He also moved his residence from Lake Tahoe to Citrus Heights, California. On October 15, 1996, he suffered a stroke.

16. Immediately after his stroke plaintiff was hospitalized at Mercy San Juan Hospital in Sacramento, California, for ten days. He was then discharged to his home to await admission to a Veterans Administration stroke rehabilitation facility in Palo Alto, California. During this wait – a period of thirty days – he was seen twice a week at his home by a rehabilitation nurse. Then he was admitted to the Palo Alto facility where he was treated for a month and then discharged.

17. Plaintiff's post-stroke physical complaints are of balance and gait difficulties which sometimes require the use of a cane, the inabilities to run, jog, climb ladders or write with his dominant hand, changes in his ability to speak, and loss of taste, bladder control and libido.

18. In the care they gave plaintiff (Dr. Chitwood on September 25 and Dr. Eaton on September 27, 1996) neither physician failed to use the reasonable care, skill and knowledge ordinarily used by physicians under similar circumstances, and therefore they were not negligent in their examinations of plaintiff.

19. The stroke suffered by plaintiff and its consequences to plaintiff were not the direct and proximate result of any negligence by either physician.

CONCLUSIONS OF LAW

The foregoing Findings of Fact, insofar as they may be considered Conclusions of Law, shall be so considered. The following conclusions of Law, insofar as they may be considered Findings of Fact, are found to be true in all respects. From the foregoing facts the court concludes:

1. This action is based on the Federal Tort Claims Act, 28 U.S.C. 1346(b). The court has jurisdiction over the parties to hear and determine the claims for relief presented. Before filing his complaint, plaintiff fully complied with the requirement for presenting an administrative claim to the Veterans Administration.

2. To determine liability of the federal government under the Federal Tort Claims Act, it is necessary to apply the law of the State of Nevada, where the alleged negligence and wrongful conduct occurred.

3. The law of negligence of the State of Nevada is that physicians have a duty to use the reasonable care, skill and knowledge ordinarily used by physicians in similar circumstances, the breach of which duty will make them liable for damages to the person directly and proximately injured by that breach.

4. Neither Dr. Chitwood nor Dr. Eaton, agents of the defendant in the premises, were negligent in the care they gave to plaintiff, and the stroke he suffered, and its consequences, were not the direct and proximate result of any negligence by either physician.

The clerk will enter judgment for defendant.

Date this 30th day of April, 2001

Judge David Hagen, United States District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

GARY LITTLEJOHN,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

CASE NO. CV-N-99-451

MINUTES OF COURT
MARCH 22, 2001

MINUTES OF COURT TRIAL (1st Day)

8:45 a.m. Court convenes
The parties stipulate to the admission of plaintiff's exhibits. Oral argument is presented on plaintiff's motion for a directed verdict. The motion stands submitted.

5:00 p.m. Court adjourns.

By: Rosemarie Miller
Deputy Clerk

RATING DECISION Department of Veterans Affairs
Oakland Regional Office

AUGUST 3, 1998

Name of Veteran: G.L. Littlejohn
VA File Number 24 287 710
Social Security No. 553-70-4839

ISSUE:

1. Entitlement to compensation under 38 U.S.C. 1151 for residuals of cerebrovascular accidents (CVAs), claimed as stroke.

2. Entitlement to compensation under 38 U.S.C. 1151 for right lower extremity deficit and ataxia due to CVAs.

3. Entitlement to compensation under 38 U.S.C. 1151 for seizure due to CVAs.

EVIDENCE

VA Medical Center Reno treatment records 11-20-95 to 9-27-96; Mercy San Juan Hospital summary to 10-15-96 to 10-25-96; VA Medical Center Palo Alto hospital summary 11-19-96 to 12-17-96 and treatment records 4-11-97 to 10-22-97; VA Outpatient Clinic Sacramento-Martinez treatment records 12-13-96 to 6-8-98; Statement dated 12-22-97 from Pattie Bachmann; Medical Opinion by Regional Office Medical Officer, Dr. R.F. Riordan, dated 6-8-98; VA examination of 7-24-98.

DECISION

1. Compensation for residuals of cerebrovascular accidents with right upper extremity deficit with tremor is granted under 38 U.S.C. 1151 with an evaluation of 20 percent effective December 31, 1997.

2. Compensation for right lower extremity deficit and ataxia due to CVA is granted under 38 U.S.C. 1151 with an evaluation of 20 percent effective December 31, 1997.

3. Compensation for seizure disorder due to CVA is granted under 38 U.S.C. 1151 with an evaluation of 20 percent effective December 31, 1997 and a 10 percent evaluation effective October 16, 1998.

ISSUES 1, 2, and 3:

The veteran claims compensation under 38 U.S.C. 1151 for residuals of cerebrovascular accidents on the basis of improper medical treatment at the VA Medical Center Reno when he was seen for symptoms on 9-25-96. Medical records show he was seen at the VAMC on 9-25-96 with complaint of intermittent tingling and numbness in the hands and arms for 3 days and dizziness for 2 weeks. There was also complaint of memory loss and intermittent diplopia. Examination at the time showed no neurological deficits. The veteran was referred for neurological consult on 9-27-96. The doctor noted seeing the veteran with no chart. The veteran's complaints and history were written down, but it is noted that the handwriting of the doctor is barely legible in this section of the report. The veteran says he informed the neurologist that he believed he was having a stroke and that he had a family history of strokes. He also had a past history of a blood clot to the lungs.

The examination findings by the neurologist are legible and indicate the cranial nerves, motor and sensory exam were all normal. Deep tendon reflexes were 2. The diagnostic impression shown on the report is "No neurologic disease". No additional tests were ordered. The veteran says the doctor told him that his problem was poor circulation in his feet and that no further treatment or exams were necessary. The veteran has provided a supporting statement from Ms. Bachmann, who apparently accompanied him to the appointments.

Mercy San Juan Hospital report shows the veteran was hospitalized 10-15-96 to 10-25-96 due to a grand mal seizure on the day of admission. He reported 2 week history of numbness and tingling in both hands intermittently and a single episode of confusion. He continued to have grand mal seizures in the ER. He was put on Dilantin. MRI of the brain showed a large right cerebellar infarction, a smaller mid brain infarction and bilateral thalamic infarctions. The veteran was subsequently hospitalized for inpatient rehabilitation at VA Medical Center Palo Alto from 11-19-96 to12-17-96. Hospital summary and subsequent treatment records show gradual improvement of deficits from the CVAs. Treatment records and VA exam show residuals right-sided deficits.

Dr. R.F. Riordan, the Regional Office Medical Officer, review the case. It is his opinion that the veteran did not receive good medical care or correct timely diagnosis by the neurologist at VA Medical Center. He states that how must this lack of good treatment effected the outcome is indeterminable, but was probably considerable.

Reasonable doubt, therefore, has been resolve4d in favor of the claimant and entitlement to compensation under 38 USC 1151 for residuals of the CVAs is established.

Department of Veterans Affairs Regional Office
1301 Clay Street
Oakland, CA 94612-5209

Medical Opinion of the Regional Office Medical Officer
In the claim of Gary Littlejohn C#24-287-710
Date of Request: 6-8-98

Medical questions at issue:

1. Could you take a look at the veteran's contention dated 12-22-97, and the medical evidence from VAMC-Reno, Sacramento and Palo-Alto and give an opinion as to whether the veteran's treatment (or lack of treatment) on 9-25-96 could have prevented or minimized his CVA on 10-15-96.

Summary of relevant medical evidence and findings: The veteran did not receive good medical care or correct timely diagnosis by the Reno V.A.M.C. neurologist. How much this lack of good treatment effected the outcome is indeterminable but probably considerable.

Date of opinion: 6-10-98

By: Richard F. Riordan, M.D.

Transcript of deposition testimony of Dr. Riordan

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5. Q And has that dispute altered your practice in any way?
6. A Very much so.
7. Q In what way?
8. A Well, now I won't answer any 1151 – give any 1151 opinions that are favorable to the veteran.
10. Q And why is that?
11. A Well, obviously you wind up in this sort of difficulty.

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8. Q So, I mean, a guy could get prepped, go into surgery on his left leg, they do surgery on his right leg, and it comes to you, because you don't want to get involved in litigation, you would, what, not render any opinion?
12. A I would tell management, "This is your problem."